IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs February 20, 2007

STATE OF TENNESSEE v. MICHAEL R. PAYNE

Direct Appeal from the Criminal Court for Sullivan County
No. S49,284 Phyllis H. Miller, Judge

No. E2006-00130-CCA-R3-CD - Filed August 14, 2007

Following a jury trial, Defendant, Michael R. Payne, was convicted of robbery, a Class C felony. The trial court sentenced Defendant as a Range III, persistent offender, to twelve years. In his appeal, Defendant argues that (1) the evidence is insufficient to support his conviction; (2) the trial court erred in not granting Defendant full probation or some form of alternative sentence; (3) the trial court erred in sentencing Defendant above the presumptive minimum sentence; and (4) the trial court erred in not granting Defendant's request for a mistrial. After a thorough review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and ALAN E. GLENN, JJ., joined.

John D. Parker, Jr., Kingsport, Tennessee, for the appellant, Michael R. Payne.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and J. Lewis Combs, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Jeanna Cox testified that she was working alone at the Chevron gas station on Volunteer Parkway in Bristol on May 26, 2004. Ms. Cox said she saw a man, whom she later identified as Defendant, approach the store between 3:45 a.m. and 4:00 a.m. Defendant carried a yellow and black umbrella because it was raining. Ms. Cox was talking to another customer when Defendant entered the store and went to the restroom. Ms. Cox said that Defendant came out of the restroom and stood watching the rain for a minute before going outside to use the pay telephone. The other customer left and Ms. Cox went outside to smoke a cigarette. Defendant approached her and asked

if he could use her lighter. Ms. Cox noticed a tattoo on Defendant's inner right arm when he reached for the lighter. Ms. Cox described the tattoo as an "S" with a flower around it.

Defendant picked up three pieces of bubble gum, and Ms. Cox went behind the counter to ring up the sale. Defendant indicated that he wanted to purchase two pieces of gum. Ms. Cox opened the cash drawer, deposited Defendant's two nickels and shut the drawer. Defendant then said he would buy a third piece. Ms. Cox opened the cash drawer again, and Defendant reached over the counter to the drawer. Ms. Cox tried to close the cash drawer, there was a struggle, and Defendant reached behind his back and said, "Watch your back, watch your back." Ms. Cox said she reached for the silent alarm and lost control of the cash drawer. Defendant grabbed the five dollar and ten dollar denomination bills from the cash register. Defendant left the store and ran through the parking lot. Ms. Cox said that she attempted to call 911, but the telephone was not working. A police officer pulled into the parking lot at that moment, and Ms. Cox told him she had just been robbed.

Ms. Cox said that the store's video had taped the incident, but the film was too blurred for identification purposes. Ms. Cox said that she identified Defendant as the perpetrator ten days after the incident, but Defendant had shaved his head and was wearing glasses at that time. Ms. Cox said that $150.00 was missing from the cash register based on an audit of that day's sales tape. Ms. Cox said that she was frightened during the incident.

Detective Aaron Blevins with the Bristol Police Department testified that he was dispatched to the Chevron station and arrived at approximately 4:25 a.m. Detective Blevins said the store's cash register was turned over, and Ms. Cox was visibly upset and nervous. Ms. Cox described the perpetrator as an African-American, Hispanic man, between thirty-five and forty years old, approximately five feet, seven inches tall, and weighing approximately one hundred sixty pounds. Ms. Cox drew a picture of the tattoo she had seen on the perpetrator's arm. Ms. Cox said that the man was wearing a baseball cap, gray t-shirt, and long shorts. The man had curly hair which stuck out from beneath the cap. Detective Blevins said he was able to identify Defendant as the perpetrator based on Ms. Cox's description. Detective Blevins said that Defendant was forty-six years old, five feet, seven inches tall and weighed one hundred and sixty pounds. Detective Blevins said that a K-Mart store was located between one and one-half miles and two miles from the gas station.

Angela Manley, Defendant's former wife, testified that she dropped Defendant off at the K-Mart store near the gas station between 2:30 and 3:30 a.m. on the day of the incident. Ms. Manley said that Defendant told her he was going to visit a friend at the Twin Oaks Apartments which was located behind the K-Mart. Ms. Manley said that Defendant was wearing long denim shorts and a baseball cap and was carrying an umbrella.

II. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his conviction. In reviewing Defendant's challenge to the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have

found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *Id.*; *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

"Robbery" is defined as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." T.C.A. § 39-13-401(a). Ms. Manley testified that she dropped Defendant off approximately an hour before the offense at a K-Mart store located approximately two miles from the Chevron station. Ms. Cox said that Defendant grabbed for the cash register when she opened it to deposit Defendant's coin. Ms. Cox said that she was frightened as she struggled with Defendant for control of the cash register. Ms. Cox said that she had the opportunity to view Defendant's face at a close distance and was able to describe the tattoo on Defendant's right arm. Ms. Cox identified Defendant as the perpetrator of the offense. Ms. Cox testified that $150 was taken from the cash register. Based on the foregoing, we conclude that a rational trier of fact could conclude beyond a reasonable doubt that Defendant was guilty of the offense of robbery. Defendant is not entitled to relief on this issue.

III. Failure to Call a Mistrial

Defendant contends that the trial court erred in not *sua sponte* declaring a mistrial during Detective Blevins' direct examination. The following colloquy occurred:

[THE STATE]:	Now, did [Defendant] make any statements in your presence as to his whereabouts on the night that this occurred around 3[:00] to 3:30 [a.m.]?
[DETECTIVE BLEVINS]:	No, sir, I asked him if he wanted to make a statement and he just –
[THE COURT]:	All right, now members of the jury at this particular point you should disregard that question and that answer and place no inference on that whatsoever . . . and not consider it in any way. Would you approach the bench?

A hearing was then held in the presence of the jury but out of the jury's hearing. The State stated that it wanted to question Detective Blevins about certain statements Defendant made in court during a hearing on Defendant's motion to continue which was held prior to the testimony of the first witness at the trial. The trial court questioned Defendant about his reasons for a continuance during which Defendant made certain responses that indicated that he was on Volunteer Boulevard around the time of the offense. The trial court ultimately denied Defendant's motion. As for the introduction of these statements at trial, the trial court found that Defendant's statements during the continuance hearing were not material and were thus inadmissible.

At no point did defense counsel request a mistrial. *See State v. Hall*, 976 S.W.2d 121, 147 (Tenn.1998) (Appendix) (failure to request that a mistrial be declared waives any further action by the trial court). Defendant, however, asserts that the trial court should have *sua sponte* granted a mistrial. A mistrial should be declared in a criminal trial only in the event of a "manifest necessity" that requires such action. *Hall*, 976 S.W.2d at 147. "The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict." *State v. Williams*, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). The determination of whether to grant a mistrial rests within the sound discretion of the trial court. *State v. Smith*, 871 S.W.2d 667, 672 (Tenn.1994). Moreover, the burden of establishing the necessity for a mistrial lies with the party seeking it. *Williams*, 929 S.W.2d at 388.

No such manifest necessity for a mistrial existed in this case. Detective Blevins' remark was brief and ambiguous. The trial court promptly gave a curative instruction, which the jury is presumed to have followed. *State v. Reid*, 164 S.W.3d 286, 342 (Tenn. 2005) (citing *Hall*, 976 S.W.2d at 148). Defendant is not entitled to relief on this issue.

IV. Sentencing Issues

Defendant's sentencing hearing was conducted on January 3, 2006. Our legislature has recently amended several provisions of the Criminal Sentencing Reform Act of 1989, which became effective June 7, 2005. The Act provides that defendants who are sentenced after June 7, 2005, for offenses committed before that date may elect to be sentenced under the provisions of the Act by executing a waiver of the defendant's ex post facto protections. 2005 Tenn. Pub. Acts ch. 353, § 18. It appears from the record that Defendant executed a waiver and elected to be sentenced under the provisions of the new act in order to be eligible for probation. *See* T.C.A. §40-35-303(a) (2005)(increasing the length of sentence for which a defendant may be eligible for probation from eight years to ten years). Accordingly, the statutes cited in this opinion are those that were in effect at the time that Defendant was sentenced.

Defendant was convicted of aggravated robbery, a Class C felony. At the sentencing hearing, the State introduced certified copies of Defendant's prior convictions in Virginia to support his classification as a Range III, persistent offender, for sentencing purposes. These convictions included four convictions for operating a motor vehicle after being adjudged a habitual offender, and

one conviction for child molestation. The State also relied on the presentence report, without objection, which showed a felony Virginia conviction for possession of drugs in a penal institution.

"A 'persistent offender' is a defendant who has received . . . [a]ny combination of five (5) or more prior felony convictions within the conviction class or higher, or within the next two (2) lower felony classes[.]" T.C.A. § 40-35-107(a)(1). "'Prior convictions' includes convictions under the laws of any other state, government, or country which, if committed in this state, would have constituted an offense cognizable by the laws of this state." *Id*. § 40-35-107(b)(4). Violation of the Motor Vehicle Habitual Offender Act is a Class E felony in Tennessee. *Id*. § 55-10-616. The offense of introduction or possession of drugs in a penal institution is a Class C felony in Tennessee. *Id*. § 39-16-201(b). If an out-of-court conviction, such as child molestation, is not a named felony in Tennessee, then the elements of the offense must be used by the trial court to determine what classification the offense is given. Although it does not specifically appear from the record that the trial court conducted this type of analysis, Defendant's four convictions for operating a motor vehicle after being adjudged a habitual offender, and his one conviction for possession of drugs in a penal institution, all of which would have been felony convictions if committed in Tennessee, are sufficient to support his classification as a persistent offender. In any event, Defendant does not challenge the trial court's persistent offender determination.

As a Range III, persistent offender, Defendant is subject to a sentencing range between ten and fifteen years for his Class C felony conviction. At the sentencing hearing, Defendant testified that he was trained as a brick mason. Defendant said that if he was granted probation he could return to his former employment at Gate City Highway where he made approximately twenty dollars per hour. Defendant said that he had an eleven-year-old son and an adult daughter. Defendant said that he supported his son when he was not incarcerated. Defendant stated that he wanted to be able to be with his son as he grew up and "show him the right way in life" so that his son did not make the same mistakes Defendant had made. Defendant said he was sorry about whoever committed the robbery against Ms. Cox. Defendant said that he worked all the time and did not steal for his living.

Defendant acknowledged that he had been convicted of the misdemeanor offenses listed in the presentence report including ten assault convictions; three convictions for driving with a suspended license; two convictions for criminal trespass; one DUI conviction; two convictions for petit larceny; one conviction for possession of drug paraphernalia; six convictions for failure to appear; one conviction for damage to property; and numerous traffic violations. Defendant acknowledged that most of the assault convictions involved his ex-wife, Angela Manley, but he said that he and Ms. Manley still cared for each other.

Defendant said his mother left home when he was very young, and he lived with his grandmother. Defendant said he has been on his own since he was fifteen years old, and he had to drop out of school to earn a living. Defendant agreed to abide by any conditions of a probated sentence. Defendant said he had previously successfully completed a five-year probationary period. Defendant acknowledged that he was $13,000 in arrears on child support.

The trial court found that Defendant's long history of convictions and criminal behavior supported application of enhancement factor (1) and determined that this factor was entitled to great weight. *See* T.C.A. § 40-35-114(1) (The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range.). The trial court also gave great weight to enhancement factor (8) in that Defendant "before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community." *Id*. § 40-35-114(8). The presentence report reflects that Defendant was paroled on his 1990 conviction for operating a motor vehicle after being adjudged a habitual offender, but his parole was revoked. Defendant's probations on two other convictions for operating a motor vehicle after being adjudged a habitual offender were revoked after Defendant stopped reporting and "absconded from supervision." Defendant was sentenced to eleven months, twenty-nine days for possession of drug paraphernalia on June 10, 2003, which sentence was suspended and Defendant placed on probation. The offense was committed on May 4, 2004. The trial court therefore applied enhancement factor (13), the felony was committed while Defendant was released on probation. *Id*. § 40-35-114(13)(B).

Based on the presence of the three enhancement factors, the trial court sentenced Defendant as a Range III, persistent offender, to twelve years. *See id*. § 40-35-210(c)(2). The trial court denied Defendant's request for alternative sentencing because the sentence actually imposed was in excess of ten years. *Id*. § 40-35-303(a).

Defendant challenges both the length of his sentence and the trial court's denial of his request for alternative sentencing. As a Range III, persistent offender, Defendant is not entitled to a presumption that he is a favorable candidate for probation for his Class C felony conviction. T.C.A. § 40-35-102(6). Defendant was, however, potentially eligible for probation because the Range III sentencing range for a Class C felony is ten to fifteen years, and a defendant is eligible for probation if the sentence actually imposed is ten years or less. *Id*. §§ 40-35-112(c)(3); 40-35-303(a). The trial court imposed a twelve-year sentence. Consequently, in order for Defendant to prevail on his argument, we must first determine that the trial court erred in determining the length of Defendant's sentence.

Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider: (1) the evidence adduced at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (6) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (7) any statement the defendant wishes to make in the defendant's own behalf about sentencing. *See* T.C.A. § 40-35-210(b); *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002).

When a defendant challenges the length, range or manner of service of a sentence, it is the duty of this Court to conduct a *de novo* review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-

401(d). The presumption is contingent upon the trial court placing on the record, "either orally or in writing, what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, in order to ensure fair and consistent sentencing." *Id*. § 40-35-210(e). The defendant bears the burden of showing that his sentence is improper. *Id*. § 40-35-401, Sentencing Commission Comments.

The 2005 amendments to the Sentencing Act rendered the enhancement factors advisory only and abandoned a statutory minimum sentence. *See* T.C.A. §§ 40-35-114, -35-210(c) As amended, the trial court is required to impose a sentence within the range of punishment, determined by whether the defendant is a mitigated, standard, persistent, career, or repeat violent offender. The statute further provides that "[i]n imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by" certain advisory guidelines, including the presence or absence of enhancement factors. *Id*. § 40-35-210(c).

The trial court found the presence of three enhancement factors based on Defendant's extensive criminal history, his past rehabilitative failures, and the fact that Defendant committed the charged offense while he was on probation. Defendant does not dispute these findings but argues generally he should be given the minimum sentence in the applicable range after "[c]onsidering all of the principles of sentencing." Defendant does not specify what factors should be considered in mitigation of his sentence. The trial court placed great weight on Defendant's lengthy history of criminal convictions and his failure at past attempts to rehabilitate. The trial court found:

> So I find there aren't any mitigating factors. And if any did apply I'd give them the least, the very little amount of weight considering the facts in this case.

Although a body of law has not yet been developed interpreting the new sentencing statute, a panel of this Court recently observed that it found prior law persuasive "that the weight to be given enhancing or mitigating factors is left to the discretion of the trial court." *State v. Jeremiah Leon Wright*, No. E2006-00726-CCA-R3-CD, 2007 WL 957330, at *1 (Tenn. Crim. App., at Knoxville, Mar. 30, 2007), *no perm. to appeal filed* (citing *State v. Madden*, 99 S.W.3d 127, 138 (Tenn. Crim. App. 2002)).

Our review of the record reveals that the trial court considered the principles of sentencing and arguments as to sentencing alternatives, and made sufficient finds of fact and stated those findings on the record. Accordingly, based on the presence of three enhancement factors and no mitigating factors, we conclude that a sentence of twelve years for Defendant's robbery conviction is appropriate. Because Defendant's sentence exceeds ten years, we need not address his arguments concerning his eligibility for probation. T.C.A. § 40-35-303(a)(providing that a sentence actually imposed must be ten years or less before a defendant is eligible for probation).

Defendant argues that a sentence in excess of the minimum sentence in Range III violates the principles set forth in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). In *Blakely*, the United States Supreme Court concluded that "'[o]ther than the fact of a prior

conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely*, 124 S. Ct. at 2536 (*quoting Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435 (2000)). The *Blakely* court clarified that the relevant "statutory maximum" for sentencing purposes "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional facts." *Blakely*, 124 S. Ct. at 2537. Subsequently, the Tennessee Supreme Court upheld our 1989 Sentencing Act against a Sixth Amendment challenge. *State v. Gomez*, 163 S.W.3d 632, 661 (Tenn. 2005)(concluding that Tennessee's sentencing structure "merely requires judges to consider enhancement factors," and unlike the sentencing guidelines struck down in *Blakely*, Tennessee "does not mandate an increased sentence upon a judge's finding of an enhancement factor").

However, the United States Supreme Court has recently filed an opinion that may again call into constitutional question Tennessee's pre-2005 sentencing structure. *Cunningham v. California*, __ U.S. __, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007). Be that as it may, at his own request, Defendant was sentenced under the Sentencing Reform Act as amended in 2005. By these amendments, the Tennessee General Assembly sought to address the possibility that provisions of our sentencing structure violated a defendant's Sixth Amendment right to trial by jury. *See State v. Mark A. Schiefelbein*, No. M2005-00166-CCA-R3-CD, 2007 WL 465151, at *44 n.28 (Tenn. Crim. App., at Nashville, Feb. 8, 2007), *perm. to appeal denied* (Tenn. June18, 2007). In *Cunningham*, the Supreme Court specifically observed that in the wake of *Blakely*, several states, including Tennessee, have chosen to modify their sentencing systems "to permit judges genuinely 'to exercise broad discretion . . . within a statutory range,' which 'everyone agrees,' encounters no Sixth Amendment shoal." *Cunningham*, 127 S. Ct. at 871. Thus, Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review of the record, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE